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The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education

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Colleges and universities are tasked with providing a safe and nondiscriminatory living, learning, and working environment. In this context, educational institutions have broad and wide-ranging responsibilities to both prevent sexual and gender-based harassment, interpersonal violence,¹ and to take immediate responsive action when such conduct occurs in connection with the educational institution's

* In the context of higher education, the authors bring a unique background and skillset that comes from advocating for thousands of complainants/victims/survivors in the criminal justice context. They have extensive experience working with hundreds of colleges and universities across the country in assessing and improving campus responses, developing policy and procedures, and providing education and training programs. Together, Smith and Gomez have dedicated more than four decades of their professional careers to responding to sexual violence, child abuse and other forms of interpersonal violence, including domestic violence, dating violence, stalking, kidnapping and homicide. As prosecutors, they observed firsthand the need for improved systems, expanded resources, comprehensive training and education and the development of fair and impartial processes for investigation and resolution that incorporate an understanding of the impacts of trauma on a victim. As educators, consultants and advisors, their service to institutions is based on the depth and breadth of that experience. As a direct outgrowth of working with thousands of victims of interpersonal violence in the context of the law, their advice and counsel are informed by a deep understanding of the dynamics of sexual and gender-based harassment and interpersonal violence and the impacts of trauma on individuals and communities. Their commitment to these issues and to supporting victims of sexual and gender-based harassment and interpersonal violence within the context of fair and impartial processes is evident in their professional histories, continued pro bono work, board service and multiple community awards from victim services agencies. For more context about the practical challenges of coordinated and integrated approaches to effective implementation of Title IX, see additional materials at footnote 10 and 82, and a forthcoming chapter in the revised *Campus Sexual Assault Response Teams: Program Development and Operational Management*, available through the Civic Research Institute.

1. While not perfect, this phrase is meant to include sexual harassment, gender-based harassment, sexual assault, dating violence, domestic violence, stalking, retaliation and related conduct.

programs or activities. While these high-level mandates are clear, the mechanics of how to fulfill the legal and moral obligations are more elusive. Moreover, the nature of evaluating interpersonal violence cases in the context of federal law and guidance creates inescapable conflicts and often-insurmountable challenges for institutions of higher education. While there is a robust federal framework in existence that governs institutional responses, in many aspects, this framework does not adequately consider the unique dynamics of sexual and gender-based harassment and interpersonal violence or the competencies, resources and structural framework of educational institutions. The current federal framework also fails to reconcile conflicts in federal and state laws and does little to resolve inevitable challenges in the coordination of campus and criminal processes when the conduct implicates institutional disciplinary and non-discrimination policies, and criminal laws. Finally, the federal framework imposes obligations on educational institutions that are at times at odds with victim agency and autonomy, and traditional principles of due process and fairness as evidenced by recent court decisions.² As a result, educational institutions are required to navigate the Scylla of civil liability and the Charybdis of regulatory oversight and enforcement actions—all while the needs of the individuals whom schools seek to serve hang in the balance.

These issues are too important—and too urgent—to ignore, especially in the context of the short educational life span of students. Sexual and gender-based harassment and interpersonal violence impact our students and employees, and have ripple effects on our communities, our institutions, and our society. Over the past five years, in response to powerful student activism, increased federal enforcement efforts, targeted media attention and dedicated and committed institutional actors, colleges and universities nationwide have engaged in the proactive—and at times, reactive—assessment of policies, procedures and practices in order to identify and implement promising and effective campus responses. Educational institutions have struggled to integrate and implement federal law and guidance with institutional practices, and in many instances, have engaged in iterative policy revisions and multiple procedural changes in a short span of time. Many of these changes have sought to integrate trauma-informed practices and procedural protections (including due process requirements of notice and the right to be heard),³ but to date, there

2. See ALYSSA KEEHAN ET AL., UNITED EDUCATORS, *CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS* 3 (2015).

3. Public institutions are required to provide due process under the Fourteenth Amendment to the U.S. Constitution; private institutions, in contrast, are not subject to state action, and their obligations to their students are premised in contract law. *See* Dixon v. Ala. St. Bd. of Educ., 294 F.2d 150, 156–57 (5th Cir. 1961).

has been no set of “best practices” provided by federal law or guidance. Thus, educational institutions have had great discretion to design and implement investigative and adjudicative models. Indeed, one prominent member of the United States Department of Education (DOE) has declared that we are in the midst of a national experiment in campus responses to sexual and gender-based harassment and interpersonal violence.⁴ In many aspects, it is an experiment that while well intentioned, is failing— at the expense of our students, our administrators, and our communities. This article seeks to propose a collaborative and coordinated solution to the stark challenges that have emerged—and the murky issues underlying those challenges.

As a foundational matter, a coordinated response to sexual and gender-based harassment and interpersonal violence requires integration of the following concepts:

- The complex legal and regulatory framework, including Title IX of the Education Amendments of 1972⁵ (Title IX), the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act⁶ (Clery Act or Clery), as amended by Section 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA),⁷ the Family Educational Rights and Privacy Act of 1974 (FERPA),⁸ and other federal, state and local laws, implementing regulations, guidance and advisory materials;
- A nuanced understanding of the dynamics of sexual and gender-based harassment and interpersonal violence and the impacts of trauma on individuals and communities; and,
- An appreciation of the unique culture, climate, policies and procedures, personnel, resources and underlying values of each educational institution.

Successful processes require that educational institutions integrate these concepts to develop a coordinated and holistic response that is

4. Remarks by Ted Mitchell, Under Secretary, Department of Education at the National Association of College and University Attorneys, June 30, 2015, Washington D.C.; *see also* NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 3 (2014), https://www.whitehouse.gov/sites/default/files/docs/report_0.pdf (“Some schools are experimenting with new models.”).

5. Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681–1688 (1972).

6. Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (1990).

7. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

8. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1968).

trauma-informed, fair, impartial, principled, and balanced in its attention to the welfare and safety of students, faculty, staff, and community members. In short, effective implementation requires consistent, compassionate, competent, and legally compliant responses.⁹

I. THE REGULATORY FRAMEWORK

Title IX is a federal civil rights law which provides that no “person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁰ Title IX applies to all educational institutions that receive federal financial assistance either directly or indirectly, including public and private elementary and secondary schools, school districts, colleges, and universities.¹¹ Although Title IX is perhaps best known for its mission to achieve gender equity in athletic programming, its protections, and the resulting responsibilities for an educational institution, are much broader in scope. Title IX prohibits discrimination on the basis of sex in all of an institution’s programs and activities, including an institution’s education programs and activities and in employment.¹² Title IX also applies to a broad spectrum of conduct, including all forms of sex discrimination, sexual and gender-based harassment, sexual misconduct, and sexual violence.¹³ Title IX’s protections apply to conduct that occurs on campus, in the context of any institution-related education program or activity, or where there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment.¹⁴ Finally, Title IX applies equally to students, employees, and third parties.¹⁵

9. For additional discussion about effective practices, see Gina Maisto Smith & Leslie Marie Gomez, *Effective Implementation of the Institutional Response to Sexual Misconduct under Title IX and Related Guidance* (June 2013), www.higheredcompliance.org/resources/resources/05D_13-06-38.pdf.

10. 20 U.S.C. § 1681(a) (2012).

11. *Id.* § 1681(a); 34 C.F.R. § 106.11 (2016).

12. See generally 20 U.S.C. §§ 1681–1688; 34 C.F.R. Part 106.

13. U.S. Dep’t of Educ., Office for Civil Rights, Dear Colleague Letter, at 1 (Apr. 4, 2011) [hereinafter 2011 DCL], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

14. U.S. Dep’t of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, at 29 (Apr. 29, 2014) [hereinafter Title IX Q & A], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

15. See 34 C.F.R. § 106.8(b) (requiring schools to adopt and publish grievance procedures for students and employees); 34 C.F.R. § 106.51 (prohibiting discrimination on the basis of sex in employment in education programs or activities); see also 2011 DCL, *supra* note 13, at 4 n.11 (“Title IX also protects [employees of a recipient] from sexual harassment. . .”).

Under Title IX, when an educational institution knows or reasonably should know about sexual harassment that creates a hostile environment, the institution must take immediate and appropriate steps to investigate or otherwise determine what occurred;¹⁶ if an investigation reveals the existence of a hostile environment, the institution must then take prompt and effective steps reasonably calculated to eliminate the hostile environment, prevent its recurrence and address its effects.¹⁷ The implementing regulations require that educational institutions publish a non-discrimination statement,¹⁸ appoint a Title IX Coordinator,¹⁹ and adopt grievance procedures that are prompt and equitable.²⁰ Grievance procedures must include:

“provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and [respondent] to present witnesses and evidence[;] designated and reasonably prompt time frames for the major stages of the complaint process[;] written notice to the complainant and respondent of the outcome of the complaint[; and] assurance that the [institution] will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.”²¹

Grievance procedures should also include:

“a statement of the institution’s jurisdiction over Title IX complaints[;] adequate definitions of [sexual and gender-based harassment and violence] and an explanation as to when such conduct creates a hostile environment[;] reporting policies and protocols, [including provisions for requesting confidentiality when making a report;] identification of the employee or employees responsible for evaluating requests for confidentiality[;] notice that Title IX prohibits retaliation[;] notice of an individual’s right to file a criminal complaint and a Title IX

16. Title IX Q & A, *supra* note 14, at 2.

17. An institution is deemed to have notice if a responsible employee knew or, in the exercise of reasonable care, should have known, about the harassment. A responsible employee includes any employee who: (1) has the authority to take action to redress the harassment; (2) has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees; or (3) a student could reasonably believe has the authority or responsibility to take action. Notice may come from a direct report or complaint by a student, employee or third party victim, or a responsible employee may observe or witness prohibited conduct. Notice may also come from indirect sources: a parent, friend or third party witness; social networking sites; the media; an open, pervasive or widespread pattern; or other facts and circumstances that should cause an institution, in the exercise of reasonable care, to initiate an investigation that would lead to the discovery of additional incidents. *Id.* at 2–4, 14–18.

18. 34 C.F.R. § 106.9.

19. *Id.* § 106.8(a).

20. *Id.* § 106.8(b).

21. Title IX Q & A, *supra* note 14, at 12.

complaint simultaneously[;] notice of available interim measures that may be taken to protect the student in the educational setting [while the investigation is pending;] the evidentiary standard that must be used (preponderance of the evidence) . . . in resolving a complaint[;] notice of potential remedies [for the complainant;] notice of potential sanctions [against respondents;] and sources of counseling, advocacy, and support.”²²

The DOE’s Office for Civil Rights (OCR) is the federal enforcement agency tasked with enforcing Title IX and other civil rights laws. In the context of Title IX grievance procedures, OCR defines “investigation” as the process an institution uses to resolve sexual violence complaints, including “the fact-finding investigation and any hearing and decision-making process the institution uses to determine (1) whether the conduct occurred; and, (2) if the conduct occurred, what actions the institution will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence.”²³ Those actions may include imposing sanctions for the respondent and providing individual and community remedies.²⁴ In 2011, OCR announced that educational institutions “must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred)” for the institution’s “grievance procedures to be consistent with Title IX standards.”²⁵ While an investigation “may include a hearing to determine whether the conduct occurred,” Title IX does not require a hearing.²⁶ Furthermore, neither Title IX nor available guidance from OCR specify who should conduct the investigation or serve as the adjudicator.

For an educational institution, the fact-finding investigation of sexual and gender-based harassment and interpersonal violence is one of the most sensitive and difficult tasks involved in the institutional response. The quality and integrity of an investigation is vital in providing a sufficient factual foundation to support determinations of responsibility and establishing faith in outcomes and sanctions. In the context of credibility assessments, it is imperative that individuals with appropriate training and experience conduct this aspect of an institution’s response. According to OCR’s April 4, 2011 Dear Colleague Letter, Title IX requires adequate, reliable and impartial investigations that are conducted by investigators with sufficient experience or training.²⁷ OCR expanded on this guidance in its April 29, 2014 *Questions and Answers on Title IX and Sexual*

22. *Id.* at 13.

23. *Id.* at 24–25.

24. *Id.*

25. 2011 DCL, *supra* note 13, at 11.

26. Title IX Q & A, *supra* note 14, at 25.

27. 2011 DCL, *supra* note 13, at 9–12.

Violence, outlining significant training requirements for investigators and noting that “provisions for adequate, reliable, impartial and prompt investigation of complaints”²⁸ require: the opportunity for both parties to “present witnesses and evidence;”²⁹ “interim measures to be implemented before the final outcome of an investigation[;]”³⁰ “periodic updates on the status of the investigation” to be presented to the parties;³¹ and the application of the preponderance of the evidence standard.³² OCR has also noted “a balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.”³³ Notably, OCR has not provided specific standards of care for investigations beyond its broad conclusory concepts such as adequate, reliable, impartial, and thorough, and institutions are free to designate investigators (employees of the institution or external resources) and the process of their choosing.

Additionally, the Clery Act, as amended by VAWA, provides statutory obligations for campus investigative responses. The Clery Act is a federal statute enacted in 1990 that requires all educational institutions that receive federal financial assistance, either directly or indirectly, to keep and publish information about crime on or near their campus through a daily crime log, an annual security report, and timely warning notifications to the community.³⁴ One purpose of the Clery Act is to provide students, their families, and employees with “accurate, complete and timely information” about campus safety to inform future decisions.³⁵ Among the other provisions related to sexual offenses, the Clery Act mandates that educational institutions develop policies, procedures, and programs regarding sex offenses.³⁶ In 2013, the reauthorization of VAWA significantly revised and expanded the Clery Act’s requirements with respect to education and prevention, reporting, and policy and procedures related to sexual assault, and required the same steps for domestic violence, dating violence, and stalking offenses.

Under the amended Clery Act, an educational institution’s policy must contain:

28. Title IX Q & A, *supra* note 14, at 12.

29. *Id.*

30. *Id.* at 19.

31. *Id.* at 3.

32. Title IX Q & A, *supra* note 14, at 14.

33. *Id.* at 26.

34. See 20 U.S.C. § 1092(f) (2012); 34 C.F.R. § 668.46 (2016).

35. U.S. DEP’T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING xi (2011), <http://www2.ed.gov/admins/lead/safety/handbook.pdf>.

36. 20 U.S.C. § 1092(f)(8); 34 C.F.R. § 668.46(b)(11).

a list of all possible sanctions and the range of protective measures that the school may impose following a final determination of sexual assault, domestic violence, dating violence, or stalking;³⁷

procedures individuals should follow if a sex offense, domestic violence, dating violence, sexual assault, or stalking occurs;³⁸

information regarding “the importance of preserving evidence”;³⁹

identification of the administrator to whom “alleged offenses should be reported”;⁴⁰

options regarding notifying law enforcement and campus authorities about alleged offenses, including the option to “be assisted by campus authorities in notifying law enforcement authorities” or to decline to notify authorities;⁴¹ and

individuals’ rights and the school’s responsibilities regarding “orders of protection, ‘no-contact’ orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court.”⁴²

Educational institutions must also publish “[p]rocedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking.”⁴³ These procedures must include a clear statement that the proceedings will entail “a prompt, fair, and impartial” investigation and resolution.⁴⁴ During disciplinary actions, both parties must have “the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.”⁴⁵ Furthermore, both parties must be simultaneously informed in writing of: “[t]he result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking[;] [t]he institution’s procedures for [both parties] to appeal the result of the institutional disciplinary proceeding[;]”⁴⁶ any change to the results of the proceeding that occurs prior to the time that such results become final; and when results of the proceeding become final.⁴⁷

37. 34 C.F.R. § 668.46(k)(1)(iii), (iv).

38. *Id.* § 668.46 (b)(11)(ii).

39. *Id.* § 668.46(b)(11)(ii)(A).

40. *Id.* § 668.46(b)(11)(ii)(B).

41. *Id.* § 668.46(b)(11)(ii)(C)(1)–(3).

42. *Id.* § 668.46(b)(11)(ii)(D).

43. *Id.* § 668.46(k).

44. *Id.* § 668.46(k)(2)(i).

45. *Id.* § 668.46(k)(2)(iii).

46. *Id.* § 668.46(k)(2)(v)(B).

47. 34 C.F.R. § 668.46(k)(2)(v) (2016).

Finally, Clery, as amended by VAWA, requires that all implementers must receive “annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.”⁴⁸

II. THE DYNAMICS OF TRAUMA AND SEXUAL AND GENDER-BASED HARASSMENT AND INTERPERSONAL VIOLENCE

The dynamics of trauma and the impacts of gender-based harassment and interpersonal violence are complex, particularly given that individual responses are both unique and evolve in nature over time. Educational institutions must be prepared to meet the varied and diverse needs of the constituents they serve at each stage in the institutional response. On a college campus, most incidents of sexual and gender-based harassment and interpersonal violence occur between individuals who know one another, typically without eyewitnesses or forensic evidence. The nature of the relationship between a complainant and respondent can impact whether and when an incident is reported. There is significant underreporting, both on college campuses and in society at large. When cases are reported, there is often a delay in reporting, which can result in the loss of whatever physical or other forensic evidence may have been available at the time of the incident. Investigating and evaluating an incident, therefore, requires a subjective assessment of credibility and all available corroborative evidence or information.

Our experience as career prosecutors, investigators, and educators who have evaluated thousands of credibility cases, has taught us that an effective investigation demands scrupulous rigor in fact-gathering by individuals with appropriate training or experience, a toolkit designed to access relevant and material information, and precise reconciliation and documentation of available information to support reliable decisions. The investigation and evaluation of credibility also requires special expertise to: identify relevant sources of information, including peripheral and corroborative evidence; synthesize all available information and reasonable inferences; and evaluate the unique and complex factors at play in each investigation, including the nature of the relationship between the parties (if any), the circumstances of disclosure, the neurobiological impacts of trauma, counter-intuitive behaviors, the impact of alcohol or other drugs on the ability to give consent and/or provide reliable observations, and any evidence of predatory, pattern or grooming behaviors. An effective investigation involves far more than soliciting a

48. *Id.* § 668.46(k)(2)(ii).

narrative from the complainant and respondent; it also involves an expansive search for corroboration where it might be expected, and consideration of demeanor of the parties, any interest, motive or bias, and the detail provided in the narratives (recognizing that the impact of alcohol, other drugs or trauma may interfere with the ability to store and recall detail).

The evaluative, judgment call nature of credibility determinations uniformly subjects the results to question by the non-prevailing party—and by others in the community who have access to information about the incident, however limited that information may be. Generally, federal privacy laws prohibit colleges and universities from sharing the details of any report or investigation with individuals other than the complainant and respondent.⁴⁹ Consequently, campus grievance procedures are cloaked with an air of mystery. The downside to this privacy protection is that most of our campus population operates without specific information, or worse, with misinformation about facts and outcomes. In addition, the parties may choose to share information with peers, many of whom “take sides” in support of one party or the other. The practical effect is that in 100 percent of credibility cases, at least 50 percent of the constituencies involved will be dissatisfied with the result. In addition, the gaps in information on many campuses tend to be filled with negative inferences, inferences that can lead to misperceptions about the process. Those misperceptions, unfortunately, often become a reality, and dissatisfaction with outcomes is not only directed at the complainant, the respondent or witnesses, but also at the investigative or adjudicative process, the implementers who evaluated the conduct, the administration, and the institution. Procedurally, the outcome is often challenged through an appeal, an OCR complaint, or a civil lawsuit filed by a complainant, a respondent, or in some cases, both parties. Moreover, in each instance, the impact of the diverse and clashing viewpoints creates fissures in the community that divide and subdivide campus communities and often lead to a breakdown of trust between students and institutions.

III. THE EDUCATIONAL INSTITUTION

Within this legal and regulatory framework, and accounting for the dynamics of sexual and gender-based harassment and interpersonal violence, an effective institutional response must still take into account the

49. An educational institution may disclose the final results of the disciplinary proceeding (including personally identifiable information) without the student's consent if the disclosure is in connection with a disciplinary proceeding at an institution of postsecondary education, the student is an alleged perpetrator of a crime of violence or non-forcible sex offense, and, the student has committed a violation of the institution's rules or policies. 20 U.S.C. § 1232g(b)(6)(B) (2012); 34 C.F.R. § 99.31 (2016).

individual culture, climate, history, resources, policies, procedure, and personnel of each institution. It is imperative for administrators to understand both institutional history and current campus climate, evaluate the coordination of systems and personnel, and understand student perceptions of campus processes, responses and resources.

In the wake of long overdue attention to the issues of sexual and gender-based harassment and interpersonal violence on campuses, educational institutions across the nation are seeking benchmarks and best practice models. Best practices, however, are elusive; in the absence of clearly articulated standards, the range of effective practices can vary greatly. To date, there is no consensus on what constitutes best practice in campus investigation and adjudications. For example, in April 2014, in *Not Alone*, the White House Task Force to Protect Students from Sexual Assault report noted “the Justice Department will begin assessing different models for investigating and adjudicating campus sexual assault cases with an eye toward identifying best practices.”⁵⁰ Since that first report, there has been no further guidance regarding best practices in campus investigative and adjudicative procedures. As a result, educational institutions have struggled to identify consistent standards of care. Campuses across the country have created internal task forces and sought advice from subject matter experts. In considering the institutional response to sexual and gender-based harassment and interpersonal violence, however, many voices have emerged from a broad cross-section of disciplines; few experts have demonstrated the ability to integrate the myriad issues attendant to developing promising practices that are trauma-informed, legally compliant, and grounded in due process.⁵¹ There remains a strong need for standards of care that serve the needs of complainants, respondents, and institutions tasked with providing a safe environment free from harassment and discrimination.

At the same time, each educational institution is unique in its characteristics, including size, student-body composition, institutional values, governance, public versus private status, and culture. Title IX applies to elementary, secondary, and post-secondary institutions. As such, OCR has stated, “depending on the circumstances, there may be

50. NOT ALONE, *supra* note 4, at 3–4.

51. As an example, in a July 14, 2014, Dear Colleague Letter on the Implementation of Changes to the Clery Act made by the Violence Against Women Reauthorization Act of 2013, the Office of Postsecondary Education noted, “We understand that outside parties may be offering training to institutions on how to comply with the new requirements under the Clery Act. None of this training has been reviewed or endorsed by the Department and the Department is not bound by any statements made by these parties.” U.S. Dep’t of Educ., Office of Postsecondary Education, Dear Colleague Letter (July 14, 2014), <https://ifap.ed.gov/dpcletters/GEN1413.html>.

more than one right way to respond.”⁵² Further, OCR has noted, “the specific steps in a school’s investigation will vary depending on the nature of the allegations, the age of the student or students involved . . . , the size and administrative structure of the school, and other factors.”⁵³ Thus, while some mandatory guideposts exist, institutions still have flexibility in designing grievance procedures, selecting investigative models, and developing sexual harassment and misconduct policies that fit their institutional framework and meet the unique needs of their community.

With respect to public institutions, there is a constitutional framework that informs institutional responses. Public institutions are required to provide due process in disciplinary proceedings.⁵⁴ Courts have generally interpreted the due process clause to require that a respondent have “notice and an opportunity to be heard.”⁵⁵ What this means, however, is a case-by-case determination considering the facts of each particular situation, including the severity of the potential punishment and the nature of the proceeding.⁵⁶ The notice requirement is fulfilled when there is a “statement of the specific charges and grounds, which, if proven, would justify expulsion.”⁵⁷ The hearing requirement will vary depending on the circumstances of the particular case and is not as clearly delineated as the notice requirement. For example, the Fifth Circuit Court of Appeals held that a hearing complies with due process if the nature of the hearing gives the administrative authorities of a college “an opportunity to hear both sides in considerable detail [and is] suited to protect the rights of all involved.”⁵⁸

IV. THE CHALLENGES OF COORDINATING CAMPUS AND LAW ENFORCEMENT PROCESSES

Many observers question why educational institutions are engaged in investigating conduct that is otherwise criminal in nature. Investigating

52. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS Y SCHOOL EMPLOYEES , OTHER STUDENTS, OR THIRD PARTIES iii (2001) [2001 REVISED SEXUAL HARASSMENT GUIDANCE], <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

53. 2011 DCL, *supra* note 13, at 5.

54. *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

55. *Smith v. The Rector and Visitors of the Univ. of Va.*, 78 F. Supp. 2d 533, 537 (W.D. Va. 1999); *see also* *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *Gorman v. Univ. of R.I.*, 837 F.2d 7 (1st Cir. 1988); *Reilly v. Daly*, 666 N.E.2d 439 (Ind. Ct. App. 1996).

56. *See Goss*, 419 U.S. at 576–579.

57. *Dixon*, 294 F.2d at 158.

58. *Id.* at 159.

and adjudicating crimes of sexual violence are tasks traditionally reserved for law enforcement officers, prosecutors, and the criminal justice system, and are seemingly beyond the traditional role of an institution of higher education. When educational institutions conduct campus investigations and there is no parallel law enforcement investigation, a common misconception is that colleges are intentionally choosing to hide criminal incidents from law enforcement. Under federal law, however, it is an adult complainant's decision to notify *or decline to notify* law enforcement of the incident.⁵⁹ Further, OCR has noted: "Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws."⁶⁰ Thus, depending on the circumstances of the report, educational institutions that respect an individual complainant's autonomy and decision to *not* share a report with local law enforcement are operating within the parameters of federal law and equally importantly, in a manner that is trauma-informed and respectful of the dynamics of sexual and gender-based harassment and interpersonal violence. This nuance is generally not captured in the analysis of college processes by mainstream media and other commenters.

Moreover, Title IX requires that educational institutions take appropriate action under campus policies, regardless of whether the matter is reported to law enforcement, and regardless of whether the individual who was harassed makes a complaint or asks the institution to take action.⁶¹ The Title IX obligation to resolve all complaints of sexual and gender-based harassment and interpersonal violence promptly and equitably in order "to provide a safe and nondiscriminatory environment for all students," is not discretionary.⁶² Under Title IX, institutions are required to respond to all complaints of Title IX-related conduct.⁶³ As OCR has observed, "[b]ecause the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations."⁶⁴

A criminal investigation and a Title IX investigation are two distinct processes, each with its own set of procedural protections and legal

59. VAWA, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89 (2013).

60. Title IX Q & A, *supra* note 14, at 27.

61. *Id.* at 27-28; U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997) [hereinafter 1997 GUIDANCE], <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>.

62. Title IX Q & A, *supra* note 14, at 27; 1997 GUIDANCE, *supra* note 61.

63. Title IX Q & A, *supra* note 14, at 27; 1997 GUIDANCE, *supra* note 61.

64. Title IX Q & A, *supra* note 14, at 27.

standards.⁶⁵ The purpose of a criminal investigation is to determine whether an individual violated a law, and if so, the individual may be imprisoned or subject to other criminal penalties.⁶⁶ In the criminal justice context, the Constitution provides criminal defendants faced with potential incarceration many protections including, but not limited to, proof beyond a reasonable doubt as the standard of proof, “the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation.”⁶⁷ In addition, police and prosecutors have both the discretion to decide which complaints to investigate and immunity from civil liability when they decide to prosecute or decline to investigate or prosecute.⁶⁸ In contrast, Title IX investigations, which will never result in incarceration, have different procedural protections and legal standards.⁶⁹ For example, OCR has put forth significant guidance documents that require educational institutions to use the preponderance of evidence standard of proof,⁷⁰ disfavor face to face cross-examination by the respondent of the complainant in campus processes,⁷¹ and suggest that students (or one’s peers) not be permitted to sit as adjudicators.⁷²

Where there are concurrent criminal and Title IX investigations, an institution should coordinate investigations and “establish appropriate fact-finding roles for each investigator.”⁷³ An institution “should also consider whether information can be shared among the investigators so that complainants [and other parties] are not unnecessarily required to give multiple statements about a traumatic event.”⁷⁴ However, many local jurisdictions have laws that prevent the sharing of criminal investigative records with educational institutions. OCR states an institution “should not wait for the conclusion of a criminal investigation or criminal

65. *Id.*

66. *Id.*

67. *Id.*

68. *See id.*

69. *Id.*

70. 2011 DCL, *supra* note 13, at 10–11; Title IX Q & A, *supra* note 14, at 13, 26.

71. OCR “strongly discourages” a school from allowing the parties to personally question or cross-examine each other. 2011 DCL, *supra* note 13, at 12; Title IX Q & A, *supra* note 14, at 31.

72. “Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence.” TITLE IX Q & A, *supra* note 15, at 30 n.30. According to OCR, significant guidance documents do not purport to create or add legally binding requirements to applicable law, however, recent enforcement efforts by OCR have held institutions accountable for the tenets set forth in these guidance documents. *See* 2011 DCL, *supra* note 13, at 1 n.1.

73. Title IX Q & A, *supra* note 14, at 24–26.

74. *Id.*

proceeding to begin its own Title IX investigation[,]"⁷⁵ but fails to consider that educational institutions have no ability to control the timing of a law enforcement investigation, which can sometimes span well beyond the prompt timeframes suggested by OCR.⁷⁶ Moreover, OCR states that although an institution "may need to delay temporarily the fact-finding portion of a Title IX investigation while law enforcement is gathering evidence[,]"⁷⁷ the institution "must take interim measures to protect the complainant"⁷⁸ and the community. This fails to take into account the prospect that law enforcement may view such actions as interference with or a threat to the integrity of the law enforcement process.

OCR recommends that an institution "enter into a memorandum of understanding (MOU) or other agreement"⁷⁹ with local law enforcement and local prosecutor's office "regarding the protocols and procedures for referring allegations of sexual violence, sharing information and conducting contemporaneous investigations."⁸⁰ However, there is no authority requiring local jurisdictions to do so.⁸¹ While OCR has said that "[a]ny MOU or other agreement must allow the institution to meet its Title IX obligation to resolve complaints promptly and equitably,"⁸² and must comply with FERPA and other applicable privacy laws, this is sometimes difficult to achieve in light of conflicting state laws.⁸³

75. *Id.* at 28.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Title IX Q & A, *supra* note 14, at 28. For example, some states require external reporting of criminal conduct that occurs on campus. This requirement seems to contradict VAWA's provision that victims should be informed of their right to decline to notify law enforcement. See OHIO REV. CODE ANN. § 2921.22 (LexisNexis 2014) ("[N]o person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities."); Jessica Horton Act, S.C. CODE ANN. § 59-154-10 (2015) (requiring campus law enforcement agencies to notify the State Law Enforcement Division of criminal sexual conduct or death on the property of the educational institution); Reporting of Acts of Sexual Violence, VA. CODE § 23-9.2:15 (2016) (requiring reporting of acts of sexual violence to law enforcement through the use of a mandated review committee). In addition, OCR states that schools should consider "whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence," but many states have criminal history records information acts, which preclude the release of information from investigative records. Title IX Q & A, *supra* note 14, at 21. See Criminal History Record Information Act, 18 PA. CONS. STAT. §§ 9101-9106 (2016). Similarly, many law enforcement agencies are prohibited from sharing the victim's name without consent of the victim. See Higher Education Campus Police Information Sharing, COLO. REV. STAT. § 23-5-141 (2016) (requiring redaction of the victim's name in sexual assault cases when sharing information with campus

In both the educational and law enforcement setting, there is a wide range of skill, competence, experience and training of investigators and adjudicators. The criminal justice system and the courts have long grappled with the dynamics of sexual, domestic and dating violence, and there is an evolving body of law designed to address what we know about the nature of sexual assault cases. Over the past several decades, societal understanding of the issues has evolved, largely in response to efforts of experts in the field of sexual and gender-based harassment and interpersonal violence. Consequently, the law has evolved to incorporate the lessons learned from experience and research. The resulting statutes and case law address concepts regarding: sufficiency of the evidence (the word alone of a complainant in a sexual assault case is sufficient to convict); rape shield laws (regarding the prohibitions against and the limitations on the use of a complainant's sexual history); appropriate consideration of *other crimes* evidence (to prove intent, motive, pattern, common plan, scheme or design, and other relevant considerations); the importance of evidence related to a victim's initial disclosure of abuse; and more general principles of notice, and an opportunity to question or challenge information.

There are expectations regarding appropriate Title IX adjudicative processes that have been created from an understanding of common law, expert knowledge of the subject matter, and the example of how the criminal justice system has incorporated an informed understanding of the dynamics of sexual violence. As a result of this framework, these expectations permeate college processes. While OCR outlines key differences between criminal processes and Title IX processes, the underlying behaviors alleged and the nature of the harm caused by a sexual assault are the same regardless of whether they are viewed through a civil rights or criminal rubric. Although the same procedural protections and legal standards necessary in the criminal justice context may not be applicable in the educational context, the same rigor of fact gathering and analysis of the conduct using thorough, impartial, fair and reliable process must be maintained in both contexts.

V. UNDERSTANDING THE DIFFERENCES BETWEEN CAMPUS AND LAW ENFORCEMENT PROCESSES

Recognizing that both processes require the same level of care in fact-finding to achieve reliable outcomes, there are significant differences between Title IX investigations in the campus setting and law enforcement investigations in the criminal context. First, as noted above, under federal

administrators); MASS. GEN. LAWS ch. 265, § 24C (2016) (prohibiting the publication, dissemination or disclosure the name of a rape victim).

law, educational institutions are required to take action in response to *all* reports of sexual or gender-based harassment or violence. In contrast, law enforcement officials can decline to investigate or charge in any matter. While some jurisdictions will investigate and prosecute a credibility case, there are many jurisdictions that will not investigate or prosecute these matters. Rather, many fall back on the antiquated excuse that the case is “just a he said/she said,” and decline to pursue a trauma-informed, fair and impartial investigation that may lead to effective criminal prosecution.⁸⁴ Nationally, this has left complainants on college campuses with only one viable option to redress alleged harm—campus processes.⁸⁵

Second, when law enforcement officials decline to charge, or when courts make a finding whether or not a sexual assault occurred, they have immunity for the exercise of reasonable judgment in the execution of these responsibilities. In contrast, educational institutions do not have the discretion to pass; nor is there the protection equivalent to immunity for the reasonable execution of Title IX responsibilities.⁸⁶ While educational institutions face challenges based on the training, competence and actions of administrators, there is no similar mechanism to test the exercise of discretion by law enforcement officers, prosecuting agencies, judges and juries.

84. As part of our educational programs offered across the country, we encourage campus administrators and law enforcement officers to eliminate the use of the phrase “he said/she said.” In addition to being heteronormative and not reflective of the full range of perpetrator/victim gender, it implies that it is not possible to determine conclusively what occurred in the investigation of a sexual assault, and continues to perpetrate the myth that sexual assaults are too difficult to prove. To the contrary, as outlined elsewhere in this article, trauma-informed and skilled forensic investigations can and do reach reliable outcomes.

85. While there has been great national attention paid to the issue of campus sexual assaults, less attention has been paid to the impact of sexual and gender-based harassment and interpersonal violence for the same age-group population, who is not privileged with the opportunity to attend college and access the broad range of Title IX rights and protections. It is our hope that the efforts and initiatives on college campuses will ultimately improve law enforcement and criminal justice processes.

86. The ability to pursue civil litigation—as a complainant or a respondent—for actual or perceived institutional failures is an important tool in securing civil rights. In the context of civil liability for Title IX violations, the United States Supreme Court held that educational institutions are “properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). *See also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). While civil liability is premised on actual knowledge and deliberate indifference, administrative enforcement action is premised on constructive knowledge (knew or should have known), and failure to take prompt and effective action in response. *See* 2001 Revised Sexual Harassment Guidance, *supra* note 52; 2011 DCL, *supra* note 13 at 4; Title IX Q & A, *supra* note 14, at 1.

Third, colleges and universities are investigating conduct that may also violate criminal statutes. To add further complexity in the Title IX context, colleges must evaluate conduct even when a complainant chooses not to make a report (based on a third party report), when a complainant declines to participate in campus disciplinary processes, or when a complainant specifically requests that the educational institution take no action against the respondent.⁸⁷ OCR has stated that an institution is required to obtain a complainant's consent before beginning an investigation.⁸⁸ OCR has also stated that it strongly supports a complainant's interest in confidentiality (e.g., agency and autonomy to choose how to proceed), but that there are cases in which the institution must "override" a complainant's request "in order to meet its Title IX obligations."⁸⁹ OCR cautions, however, that an educational institution "should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence."⁹⁰ This competing set of requirements and cautionary instructions leaves many educational institutions struggling to balance what we call the "confidentiality conundrum"—how to respect individual agency and autonomy, but still take responsive action to articulable broader campus safety considerations.⁹¹ The practical implication is that when an educational institution has notice of potential harassment or violence, but the complainant does not consent to an investigation, the institution must balance the interest of the complainant with its dual obligation: 1) to provide a safe and non-discriminatory environment for all community members and, 2) to fulfill principles of fairness that require notice and an opportunity to respond before action is taken against a respondent.⁹² While OCR has identified a series of risk factors to consider in making this determination, there is no magical alchemy or formula that

87. Title IX Q & A, *supra* note 14; 2011 DCL, *supra* note 13, at 5.

88. 2011 DCL, *supra* note 13, at 5.

89. Title IX Q & A, *supra* note 14, at 18–19.

90. *Id.* at 19.

91. OCR provides that an institution should take "all reasonable steps to investigate and respond to a complaint consistent with the request" for confidentiality or request not to pursue an investigation, but concedes that the institution's ability to do so may be limited based on the nature of the request by the complainant. *Id.* at 20. Even if not proceeding to an investigation or imposing disciplinary action, however, OCR states that the institution should still provide reasonably available interim measures and take other steps to limit the effects of the alleged sexual or gender-based harassment or violence and prevent its recurrence. *Id.* at 19–22.

92. For a deeper discussion of the confidentiality conundrum and institutional reporting requirements, see Leslie Gomez & Andrea Stagg, Sexual Misconduct and Crime Reporting: Title IX and Clery Reporting Obligations and Confidentiality Concerns (November 2015), http://www.nacua.org/securedocuments/programs/November2015/07B_15_11_7.pdf.

leads to the correct balance in every report.⁹³ It is in this space that institutions are required to make the most sensitive of judgment calls—often without sufficient information to inform the decision. In essence, educational institutions are required to conduct risk assessments in a vacuum.

Fourth, in order to be “adequate,” “reliable,” “thorough,” “impartial,” “prompt” and “equitable” under Title IX,⁹⁴ and “prompt, fair, and impartial” under VAWA,⁹⁵ sexual and gender-based harassment and interpersonal violence investigations require a thorough exploration of the facts, consideration of medical and forensic information, the ability to access relevant evidence, and compel cooperation of witnesses. Most educational institutions do not have access to the same toolkit as law enforcement professionals: a toolkit that includes subpoena power, access to forensic labs and expertise, a dedicated commitment of resources and personnel, investigating grand juries, and other significant assets. Colleges often find themselves investigating sexual assaults without the requisite tools and evaluating allegations with only partial information. This deficiency—and potential impact on the reliability of outcomes—harms complainants, respondents and campus communities.

Fifth, the dynamics of campus responses are complicated by the institutional structure and framework. In the criminal justice system, separate and distinct entities are tasked with each step of the process: the police department for emergency response and investigation; the prosecutor’s office for additional investigation, charging authority and prosecution; a defense attorney for legal representation and advocacy for a defendant; a judge or jury for adjudication and sanctioning; a probation, parole or corrections department for enforcing and monitoring sanctions;

93. Risk factors to consider include: the seriousness of the conduct, the respective ages and roles of the complainant and respondent, whether there have been other complaints or reports of harassment or misconduct against the respondent, and the rights of the respondent to receive notice and relevant information before disciplinary action is sought. 2011 DCL, *supra* note 13, at 5. Additional risk factors include: whether circumstances

[S]uggest there is an increased risk of the [respondent] committing additional acts of sexual violence or other violence[,] . . . whether the [respondent] has a history of arrests or records from a prior school indicating a history of violence, whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, . . . whether the sexual violence was committed by multiple perpetrators[,] . . . [whether the circumstances] suggest there is an increased risk of future acts of sexual violence under similar circumstances[,] . . . whether the sexual violence was perpetrated with a weapon, and whether the [institution] possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).

Title IX Q & A at 21.

94. Title IX Q & A, *supra* note 14, at 12, 25–27; 2011 DCL, *supra* note 13, at 5, 9.

95. 34 C.F.R. § 668.46 (k)(2)(i) (2016).

an independent court for evaluating appeals; a victim advocate for confidential assistance for victims; community agencies for crisis response, support and advocacy, and many more specialists in the process. In contrast, in the educational setting, the institution is required to be all things to all people—to foster a climate that prevents incidents and fosters reporting; to provide support and advocacy for a complainant *and* a respondent; to provide an impartial, reliable and thorough investigation; to provide prompt and equitable grievance procedures; and to provide impartial adjudication and appeal. Many institutions lack the resources and dedicated personnel to effectively separate and fulfill each of these roles. Even if schools had the resources to effectively separate and fulfill these roles, they are nonetheless exercising oversight of the entire process. Consequently, the requirements of Title IX create baked-in and irreconcilable perceptions of conflict in the context of credibility cases, a context where the removal of any perception of bias or self-interest is critical to reliable outcomes.

Lastly, educational institutions are often tainted with a perception of institutional bias, meaning that if and when they do err, they are presumed to have done so to protect the institution. Rather than attribute the failure to a lack of training, lack of subject matter expertise or lack of competency, the negative inference is that the institution acted out of institutional self-interest. The accusations in response to institutional action range from institutions underreacting and sweeping things under the rug, to overreacting and finding students responsible for sexual assault merely to quell the vitriol associated with the national spotlight placed on sexual and gender based harassment and interpersonal violence in higher education. To be clear, if the institutional failure results in harm to a complainant or respondent, discerning the nature of the failure is a distinction without a difference. In taking steps to improve campus practices and remedy past harms, however, it is more critical that we take the time to understand the intention of the administrators and reasons for the failure. In the current climate, there is little recognition of the commitment of individual administrators or to need to work collaboratively to educate and transform current practices. While there are certainly compelling examples across the country of ill-informed actions and bad intentions, not every institutional or administrative failure should be viewed through this lens. Many instances of individual or institutional failures can be traced to ineffective policies, insufficient training, incompetence, human error or lack of coordination—all of which need to be remedied to better serve complainants, respondents, and campus communities.

In short, the federal enforcement efforts are requiring educational institutions to engage in investigating sexual violence at a level that is not currently exercised or required by law enforcement charged with broad

responsibility for societal safety from those who engage in sexual violence. Moreover, the federal government requires educational institutions to provide thorough, impartial and equitable evaluations of facts without the necessary resources or tool kit that would enable institutions to access important and material information in assessing credibility cases — information like text messages, Snapchat history, Facebook posts, physical or forensic evidence, or surveillance data. The campus process is limited by time, resources, and the power to gather important relevant information. Gathering relevant information is especially difficult given that campus investigations rely on the voluntary participation of the participants and witnesses. These limitations expose college and university processes in *every* case to the accusation of unreliable findings based on an incomplete factual record. This design serves neither complainant nor respondent, and necessarily undermines the trust in decisions of consequence to all involved.

While the federal government's goal is noble, and we wholeheartedly endorse the requirements of education, training and rigor in investigations, both the national dialogue on these issues and the federal enforcement efforts fail to take into account the tremendous complexity of the issues, the context of educational institutions, privacy considerations and other impediments to effective implementation of Title IX on college campuses. Indeed, the current enforcement framework and evolving expectations of the courts seem to be requiring educational institutions to subsume a criminal justice function without the toolkit to do so effectively. Colleges and universities are designed to educate—it is what they do well. Higher education's most effective skills lie in prevention and education designed to shift campus climate and culture, not in investigating and adjudicating criminal conduct. The more that federal obligations force colleges and universities to act like prosecutors and courts, the less able educational institutions will be to carry out their educational mission. In turn, when educational institutions routinely assume a role outside of their core competencies, without the appropriate resources and toolkit to do so effectively, there is an inevitable erosion of trust that can lead to perceptions of institutional betrayal and failure.

VI. A SOLUTION: THE REGIONAL CENTER FOR INVESTIGATION AND ADJUDICATION

In reconciling the inherent challenges in investigating sexual and gender-based harassment and interpersonal violence, we have long advocated for a shift in the structure of campus responses that incorporates a regional investigation and adjudication center, similar to the multi-disciplinary approach used in child advocacy centers. These regional

centers would represent a partnership between federal and/or state government, law enforcement, and institutions of higher education, and could provide an invaluable resource for those Title IX cases that would also constitute crimes under state law. Regional centers could provide the forum for trauma-informed interviews by external, trained and experienced investigators. Regional centers could also provide an independent, neutral and experienced adjudicator. In addition to investigation and adjudication services, through additional partnerships, regional centers could provide access to dedicated victim advocacy and forensic examination services.

While there may be a variety of viable models, the regional center could operate as an independent non-profit organization, an arm of a prosecutor's office, or a newly created government agency. Funding for the Center could come from several sources, including federal grants, state grants, institutions of higher education, and law enforcement. Regional centers would be staffed by trauma-informed investigators who would coordinate with both educational institutions and law enforcement agencies about the wishes of a complainant and the available facts and circumstances in order to determine the path of each case. Incidents of sexual and gender-based harassment and interpersonal violence could be reported to colleges and universities, law enforcement, or directly to the regional center, and the regional center would have responsibility for carrying out the investigative and adjudication responsibilities outlined by Title IX and VAWA. Educational institutions would maintain the responsibility for support, interim measures, sanctions, tracking of patterns, and identification of individual and community remedies to address the effects of any discrimination or harassment.

The concept of a regional center has the potential to resolve many of the challenges identified in this article. First, the regional center could provide a forum for objective and independent fact-finding that may reduce barriers to reporting for complainants who are reluctant to notify either campus or law enforcement authorities. The regional center could be a neutral resource that helps a complainant maintain agency and autonomy in the disclosure and dissemination of information, and potentially, because the regional center is not part of the educational institution, reduce the perception of institutional bias. Much like a child advocacy center, the regional center would allow for investigations that are conducted by trained and experienced professionals who have no affiliation to any particular institution, effectively removing the perception of institutional bias.

Second, regional centers could serve as the hub for collaborative interaction between higher education and criminal justice responses. With the complainant's consent, a recorded interview could be shared with law

enforcement and campus administrators. Based on state law provisions, the regional centers could also allow for the sharing of information between law enforcement and higher education by creating exceptions to the sharing of information that is currently prohibited by FERPA or state criminal law confidentiality provisions. The potential long-term benefits of increased collaboration could be educational for campus and law enforcement processes, enhance relationship building, and provide a greater level of transparency in process that builds trust in systems and outcomes.

Third, by facilitating a partnership between educational institutions and local law enforcement, the regional center would streamline the investigation and adjudication process in a manner that respects the agency and autonomy of an adult victim and incorporates principles of due process. The use of a formal, forensic interview could reduce the need for multiple interviews of the complainant, respondent and witnesses. In addition, regional centers, in collaboration with local law enforcement agencies, should have access to traditional law enforcement investigative tools in order to gather material evidence that might not otherwise be available to educational institutions. Having access to dedicated investigative resources could also ensure that investigations are conducted efficiently, completed promptly, and that all information needed for a reliable outcome can be identified and gathered.

Fourth, using a regional center with dedicated investigative resources would allow for the clean separation of support and advocacy services (the system of belief) from investigative and adjudication services (the system of proof). Because combining support and investigative functions can blur the clear lines of demarcation necessary to maintain a neutral and impartial investigation, create confusion for the complainant or respondent, and lead to a lack of trust in the integrity of the investigation based on a perception of bias toward one party or the other, it is critical that individuals implementing support services and interim measures be managed by individuals not directly involved in the investigation of an allegation. Complainants could choose to access support services from their educational institution or from the community-based advocacy services associated with the regional center. Either resource would be wholly unconnected to the neutral, forensic interviewers and investigators involved in the interview and investigative process.

Finally, the regional center model would eliminate the inefficiency and enormous drain on resources associated with building and maintaining in-house investigative and adjudicative processes at educational institutions, and would ensure that students across our nation's institutions receive similar treatment in the investigation and adjudication process regardless of the resourcing or expertise of their institution. Further, the

dedicated trained investigator model would add reliability to the process and enhance trust in the outcomes because of increased trust in the process. The regional center could also incorporate a training arm to provide training services to fulfill the federally mandated training requirements to students and employees, again resulting in standardization of quality across institutions, efficiency and significant cost savings.

We have recommended the concept of a regional center for investigation and adjudication for many years.⁹⁶ As we travel the nation to address these complex issues, we routinely advocate for the concept of the regional center. Most recently, we provided an outline of this proposal to the Commonwealth of Virginia and are gratified that their 2016 budget dedicates funds to study the viability of a Regional Center for Virginia colleges and universities.⁹⁷ We continue to work with other state and government officials to explore this solution on a statewide basis.⁹⁸ Our goal is to ensure that trauma-informed, fair and impartial processes are available to all on a consistent basis—to equalize access to campus and law enforcement processes for all impacted by sexual and gender-based harassment and interpersonal violence.

In sum, creating regional centers for investigation and adjudication has the potential to reduce complexity, streamline the resolution process, and provide all parties with the confidence of independent, objective, trained professional evaluation of these difficult cases. It is our hope that the coordinated efforts of higher education, law enforcement and government officials (local, state and federal) can foster increased reporting, minimize barriers to participating in investigative processes, and provide for better outcomes in both campus and criminal justice processes.

96. See GINA MAISTO SMITH & LESLIE M. GOMEZ, PEPPER HAMILTON, OCCIDENTAL COLLEGE: REPORT OF EXTERNAL AUDIT AND ASSESSMENT OF TITLE IX POLICIES, PROCEDURES AND PRACTICES 18 n.44 (2014), http://www.oxy.edu/sites/default/files/assets/Presidents_Office/Pepper-Hamilton_Occidental_Report_20141027.pdf.

97. See *Budget Bill-HB230*, VA. LEGISLATIVE INFO. SYSTEM, <http://budget.lis.virginia.gov/item/2016/1/HB30/Enrolled/1/146/> (last visited July 1, 2016) (designating \$100,000 to “design a pilot program to create a regional center for the investigation of incidents of sexual and gender-based violence” based on “partnership between higher education, law enforcement, and state government[;]” the regional center would allow “criminal incidents of sexual and gender-based violence to be reported directly to the center for independent and neutral investigation” by “trauma-informed investigators who would coordinate with both colleges and universities and law enforcement to carry out the investigative responsibilities outlined by Title IX” and Clery/VAWA).

98. While representatives of the federal government have been open to exploring this solution, they have not embraced the potential cost and complexity of a national approach, and instead favor a state level solution.